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IN THE

Supreme Court of the United States

October Term, 1955.

No. 201

DAVID HYUN,

Petitioner,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1955.

No. .....

DAVID HYUN,

Petitioner,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on January 31, 1955.

Opinions Below.

The decision of the Hearing Officer of the Immigration and Naturalization Service [S.R. 63-69]*, the decision of

*Signifying pages 63-69 of the Record of the Immigration and Naturalization Service (*i.e.*, Service Record, indicated simply: S.R.) filed in the Transcript of Record herein in two volumes, with continuous, independent pagination, and entitled, "Respondent's Exhibit 'A' in Two Volumes"; citations to the Transcript of Record proper as certified to by the Clerk of the Court of Appeals below are cited merely: R. 1.

the Assistant Commissioner of the Immigration and Naturalization Service [S.R. 9-14] and the decision of the Board of Immigration Appeals, United States Department of Justice [S.R. 4-8] are unreported and are appended hereto as Appendices "B", "C" and "D", respectively. The opinion of the District Court [R. 37] is similarly unreported and is appended hereto as Appendix "E". The opinion of the Circuit Court of Appeals is reported in 219 F. 2d (Adv. Ops.) 404, and is appended hereto as Appendix "A".

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 31, 1955 [R. 54]. Rehearing was denied on April 7, 1955 [R. 55]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

Whether in a deportation proceeding it violates due process and Constitutional standards of fair hearing to take evidence against the alien through *"ex parte* depositions" of witnesses in Hawaii, 2,500 miles from the place of hearing and of the alien's residence, Los Angeles, particularly in consideration that,

(a) the *"ex parte* depositions" constituted not merely a part but the *entirety* of the substantive evidence adduced on behalf of the government, and, being taken, as described, without the presence or agreement of either the alien or his counsel, characterized the hearing as *total* trial in *absentia;*

(b) the deportation proceedings affect a lawfully-admitted, long-resident alien, married to a citizen and father of citizen children, assimilated fully to American habits, language, culture and life;

(c) the procedure of foreign depositions taken away from the place of hearing was required by no consideration of necessity or compelling cause, but was undertaken, and avowedly, merely to serve government convenience and economy.

The Constitutional provision involved is the due process provision of the Fifth Amendment of the United States Constitution reading, "No person shall be . . . deprived of life, liberty or property without due process of law. . . ."

Statement of the Case.

The proceedings below were proceedings in habeas corpus initiated by the petitioner here against the district director at Los Angeles of the Immigration and Naturalization Service (respondent here), challenging a final order of deportation against petitioner for denial of procedural due process.

Petitioner was born in Korea in 1917 and is an alien in the sense of accident of place of birth only. In 1924 at the infant age of seven years, petitioner entered the United States, lawfully and for permanent entry, at the port of entry of Hawaii, and ever since that date to the present time petitioner has lived continuously in the United States, with purpose always so to do, and petitioner is at present as demonstrated by the record a person totally assimilated to the culture, values, language and way of life of our society and people. Petitioner is a resident of Los Angeles, California, and is an architect by profession, and is married to a citizen wife and is the father of two children, sons, both citizens by birth. Petitioner is "alien" neither in his own mind nor to his family, his community, or his work, but only to the law.

October 31, 1950 petitioner was arrested in Los Angeles, where he was resident, by warrant of the Immigration and Naturalization Service, and was charged with deportability under the Act of October 16, 1918, as amended, 1950, upon the charge of "[having] been, after entry, a member of the following class set forth in . . . said Act: an Alien who was a member of the Communist Party of the United States." [S.R. 262].

Petitioner was taken into custody and was held continuously and without privilege of bail throughout the entirety of the administrative hearings accorded him, as hereafter described, and until determination of his deportability.

Hearing upon petitioner's case was held in Los Angeles where he was in custody and was resident, the hearing commencing November 22, 1950 [S.R. 69]. Almost at the outset, and after only preliminary matters affecting alienage [S.R. 89], the government moved to take depositions *in Hawaii* of four named persons, to constitute in their sum, as later became clear, the totality of the government's evidence on the substantive issue of the charge, claimed membership after entry in the Communist Party.

As stated, at the time of the motion petitioner was in custody of the respondent and was denied right of bail. At the time of the motion, petitioner was not advised he might attend the depositions, but was informed only that he might "be represented" there "by counsel" [S.R. 93], or might submit written interrogatories [S.R. 93]. Subsequently petitioner was given written notice of the intended place and date of the depositions advising him "your counsel may appear" or representation would be allowed "through associate counsel", but again without

even advising petitioner he might personally attend [S.R. 325]. The notice was delivered to petitioner in confinement [S.R. 325].

Before [S.R. 89-95] and after [S.R. 109-115, 242-249] the motion for and the taking of the depositions, which were taken in Hawaii, December 18, 1950 [S.R. 267 *et seq.*], petitioner through counsel objected to the procedure as violating procedural due process and denying the rights to confrontation of witnesses and to cross-examination, and repeatedly, and earnestly requested that either the witnesses be produced at the hearing, or petitioner, counsel, or both, all alternatively, be transported to the place of the depositions to attend the same. All of these requests and motions were denied [S.R. 90-91, 111, 115, 242, 249]. The Hearing Officer declared and ruled that in deportation proceedings depositions might be taken by the government at its choice, and at whatever place might be convenient, and that attendance there by counsel and/or the individual under charge was a purely civil-litigation concern of such individual, and no more. Further, if counsel did not attend, such was *in se waiver*. (*Ibid.*)

After the depositions had been taken, the government suggested that even the petitioner, despite his custody, "would have been" permitted to attend the depositions in Hawaii, under guard, if he had "requested" so, and "if he could have made the financial arrangements" to pay for conducting himself and personnel sufficient to keep him "under proper safeguards" to Hawaii and return [S.R. 114].

To the objection that it was impossible to cross-examine crucial witnesses by correspondence through interrogatories, and without confrontation, and that no associate

counsel in Hawaii could undertake cross-examination for petitioner without petitioner's attendance and assistance, and to all requests that the government either bring the witnesses to the hearing in Los Angeles or transport petitioner, or counsel, or both to Hawaii for cross-examination, the Hearing Officer ruled flatly, and several times, neither due process nor policy nor any requirement of law burdened the government either to produce its witnesses at the hearing or to transport anyone—alien or counsel—to the place of the taking [S.R. 111, 249, 94-95, 64].

As grounds for its motion to take the depositions in Hawaii the government made no showing or representation of cause or necessity except that the witnesses were residents of Hawaii and that it would serve better the convenience of the government and of such witnesses to have examination by depositions in Hawaii rather than to produce the witnesses at the hearing in Los Angeles [S. R. 94]. Los Angeles is 2,500 miles from Hawaii, and by modern government planes transportation between the two points is a matter of between 8 and 9 hours, or less.

As stated, the depositions were taken December 18, 1950, in Honolulu, Hawaii. At their taking, petitioner was not present nor was he represented by anyone as counsel [S.R. 267-269]. The depositions were taken *ex parte*, by an examining officer and a hearing officer, and these [S.R. 267] not even the officers charged with conducting the proceedings in Los Angeles [S.R. 69; compare S.R. 267]. All of the depositions were taken in a single day, and four persons were affected as witnesses; Richard M. Kageyama [S.R. 269-273], Donald T. Uesugi [S.R. 273-286], Ichiro Izuka [S.R. 286-314], and Easter J. Doyle [S.R. 314-323].

Of the four deponees, one (Kageyama) refused totally to be a witness, invoking the privilege of the Fifth Amendment [S.R. 272]. The other three were examined by the Examining Officer without objections or cross-examination from any source, and without even suggestion of restraint or discipline by the Hearing Officer. The examination was characterized in entirety by grossest impropriety and unfairness in the questioning, including questions crudely, even abusively, leading and suggestive in form and import, and including open and unashamed invitations for conclusions, opinions, and even "guesses" [S.R. 273-323, and especially as illustrative, 275-276, 280-282, 294, 299-303, 317-323].

Despite the character of the examination, deponee Doyle "testified" to nothing of probative import [S.R. 314-323]. His statement was merely that he considered discussions of communism "dry" [S.R. 317] and that David Hyun had "not directly" talked to him of such [S.R. 317], and that he did not "know directly whether he was one [communist party member] or not, but my belief [was] that he was one" [S.R. 318], and that he had "no reason at all" to doubt he was a member [S.R. 320]. The Hearing Officer disallowed Doyle's testimony as without probative significance [S.R. 64].

Deponee Uesugi [S.R. 273-286] as a witness was comparable. Like Doyle's declarations, Uesugi's were declarations solely of conclusions and assumptions. Uesugi declared that a person he identified as petitioner, from a passport photo, was probably a communist party member because seen by him at not more than four to six meetings of people, "I think they are communists" [S.R. 281], at which there occurred discussion "something like concerning labor movements," and assumed by the witness to be

"closed communist meetings" because "they closed the doors" [S.R. 282], and because "I have no reason for believing that he was not a communist" [S.R. 282], and "because it is a meeting and nobody else would be in it" [S.R. 282]. This, in 1946-1948.

The declarations of deponee Izuka [S.R. 286-314] were of like quality and character. Like the others, Izuka spoke, of course, on the basis only of passport photo identification, and on such basis Izuka placed a person identified as petitioner at three meetings believed by him to be "closed" meetings of the "Executive Board" of the Communist Party in Hawaii, whereat he "saw David Hyun representing the Punchbowl group" [S.R. 293], respecting which meetings Izuka declared, "Well, I am sure that all of them were active members in the Communist Party" [S.R. 299]. No other circumstances indicating petitioner was a communist party member existed to his knowledge, Izuka stated, except the foregoing and that petitioner once represented some office workers in a work dispute [S.R. 301]; at no time did Izuka and petitioner ever discuss the Communist Party or communism, but only union matters and social affairs [S.R. 300].

The four *ex parte* depositions constituted the *only* government evidence against the petitioner, and on the basis avowedly thereof the Hearing Officer recommended an order for petitioner's deportation [S.R. 63 *et seq.*].*

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*Evidence-wise the depositions were supplemented by no other evidence or testimony, and were aided in no way nor even affected by any other matter or circumstance, save the totally privileged circumstance that petitioner, on being examined himself by the government as a witness, invoked the Fifth Amendment's privilege against self-incrimination as to all questions affecting membership in or affiliation to the Communist Party [S.R. 230 *et seq.*], as, of

Repeated requests were made by petitioner to the Hearing Officer after the depositions for production of the witnesses for cross-examination and confrontation, or for transportation of petitioner, or counsel, or both, to the witnesses for confrontation [S.R. 109-115, 242-249]. All such were denied [S.R. 111, 115, 242, 249]. To the arguments of counsel that deportation—and especially deportation of one who has lived for 27 years and since infancy in the United States, and is married to a United States citizen and has citizen children, and therefore has "so much at stake" [S.R. 247] "is not a question of one party suing another party for some money or a judgment or for damages", and is not even to be equated to "an ordinary criminal action" [S.R. 247], but is as serious in its consequence and as a forfeiture as the most serious criminal cause, and requires, and should require, as a condition of due process, the duty of producing witnesses for confrontation and cross-examination of right—particularly where no more is entailed than mere government convenience or minor transportation expense [S.R. 247], the Hearing Officer's reply was a total denial [S.R. 249], with the explanation only,

> "In deportation proceedings the government does not have the burden of sending the respondent or his counsel to the place where the depositions are taken. Therefore, your objection on that ground is overruled." [S.R. 111.]

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course, he had a full constitutional right to do. (*Blau v. United States*, 340 U. S. 159; *Brunner v. United States*, 343 U. S. 918; *Quinn v. United States*, May 23, 1955, 75 S. Ct. (Adv. Ops.) 668, n. 29.) No "evidence" against petitioner can arise from this conduct by him, nor adverse inference be drawn, since petitioner's action was totally privileged and was attended by high Constitutional policy. (*Quinn v. United States*, May 23, 1955, 75 S. Ct. (Adv. Ops.) 668.)

The Assistant Commissioner, Adjudications Division, adopted the decision of the Hearing Officer and ordered deportation [S.R. 9-14]. Respecting the depositions, the Assistant Commissioner in his opinion said only that counsel "protests that the hearing officer permitted depositions to be taken in Hawaii, without providing transportation to that place for the respondent or counsel. The law requires no such provision." [S.R. 13.]

Before the Board of Immigration Appeals, the final and dispositive administrative agency, petitioner additionally and specifically protested against the *ex parte* depositions, and requested that the Board of Appeals order re-opening of the case and order production of the witnesses for confrontation and cross-examination, or transportation of petitioner and counsel to the witnesses for such purposes [S.R. 15-18]. Particular observation was made that procedural due process and essential fairness in a hearing so serious in character as the deportation of one positioned as petitioner was "a burden upon the Government", and fairly so, and in such premises it could not justifiably be urged that "due process can be done away with because it might be somewhat expensive to the Government. * * * expense is not enough to take away due process" [S.R. 18].

The Board of Immigration Appeals affirmed the deportation order [S.R. 4-8], denying the request that it order confrontation, and stating on such score,

> "There is no provision of law or regulations which requires that the United States Government provide transportation for an alien or counsel to the place of hearing in a situation such as in this case where the respondent resides in the State of California and depositions were taken in Hawaii" [S.R. 7-8].

Thereafter, and after arrest under warrant for deportation dated December 18, 1952 [S.R. 2-3], petitioner filed petition (July 24, 1953) in the District Court below for habeas corpus challenging the validity of the said order and the administrative hearing for denial of procedural due process, insufficiency of evidence, and unconstitutionality in the deportation statute in providing for deportation of persons for mere membership in the Communist Party, *eo nomine,* as a named organization [R. 3-10].

The District Court, after reviewing the record of the administrative proceedings, on August 21, 1953, sustained the order of deportation and denied the petition for habeas corpus [R. 37-38].

Petitioner appealed.

The Circuit Court of Appeals below affirmed the judgment of the Trial Court and sustained the validity of the deportation proceedings and the order for deportation. Respecting the taking of the depositions in Hawaii without confrontation, the Circuit Court of Appeals declared that notwithstanding petitioner's protests that the depositions were taken "while he was in custody" and while he was "financially unable" to transport himself or counsel to Hawaii, and notwithstanding the "plethora of government transportation between Hawaii and the West Coast", and "the comparative financial resources of Hyun and the Government of the United States," no denial of due process was involved because: "Deportation hearings are civil in nature and the alien need not be confronted by the witnesses; evidence may be obtained by deposition * * * We have heretofore decided that the fact that an alien is financially unable to travel to a place where he could cross-examine the witnesses, or send an attorney is not a denial of the right of cross-examination." (Appendix "A".)

Reasons for Granting the Writ.

Introductory Summary.

At bar *ex parte* depositions were used not merely incidentally but as the *total* substantive trial evidence, and thus petitioner was subjected in entirety to trial in *absentia*. The naked right even to be present at one's own hearing was denied, and in consequence there was denial and disregard of the included rights to observe the conduct of one's trial, to confront witnesses, to cross-examine, and the right to assist, and be assisted by, counsel. More, the violations of these basic rights was had *needlessly*, and without compulsion of necessity, and only to accommodate to government convenience and economy.

Furthermore, the inquiry at bar affected a deportation proceeding wherein the gravest of forfeitures and penalties were in balance. Petitioner has been resident in the American community all of the meaningful years of his life, and since earliest childhood, and is married to a citizen and the father of two citizen children. The deportation at bar threatens permanent separation from family and an uprooting of life amounting in fullest measure to banishment and exile. In the premises of such a deportation it can not accord with due process of procedure to permit needless trial in *absentia* and disregard of the basic right of presence of the accused.

The decisions of this Court outside deportation law in both criminal and non-criminal causes make explicit that due process requires mandatory presence of the person charged in all proceedings seriously affecting liberty, per-

son or life, save as qualified only by necessity. Like considerations of both principle and policy apply in the case at bar.

That the proceedings are technically "civil" does not answer the issues posed. Fair procedure in causes seriously affecting liberty, person or life is a matter not merely of private concern, as a property issue might be, but a matter of deepest self-interest to *all society,* and fairness of judgment is required there mandatorily *by the Constitution.* Society cannot afford to be careless as to liberty, person or death.

The issues involved at bar rise far beyond the individual case of petitioner and presents a fearsome precedent. A ruling is sought at bar by the government to so limit procedural rights in deportation as to permit taking of *ex parte* depositions far removed from the place of hearing and without provision for attendance by the alien or counsel, in any deportation proceedings at the pleasure of the government. If such a precedent be established the spectacle is presented of possible wholesale use of depositions, particularly in political deportations, with accusations made *ex parte,* and by informer-accomplice witnesses, without check or restraint whatever by confrontation or cross-examination.

I.

The Deportation Proceedings at Bar, Purposed as They Were at Deportation of a Lawfully-Admitted, Long-Resident Alien to Whom Deportation Is Equitable to the Heaviest Forfeitures Short Perhaps of Life Itself, Violated Due Process and Constitutional Standards of Fair Hearing in Dispensing Totally With the Requirement of Presence of the Accused, and Accepting as Total Evidence of Deportability Depositions Taken Without the Presence or Agreement of the Alien or Counsel 2500 Miles From the Place of Hearing and Residence, and This Needlessly and Solely to Serve Government Convenience.

1. The Requirements of Procedural Due Process Apply to and Condition Deportation Proceedings.

Although the decisions of this Court affecting *substantive* deportation power, appear at times to assume in Congress as to enactment of substantive grounds for deportability "plenary" or little-limited constitutional power (*Galvan v. Press,* 347 U. S. 522; *Harisiades v. Shaughnessy,* 342 U. S. 580; *Carlson v. Landon,* 342 U. S. 524*), and although such decisions have likewise on occasions

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*Albeit depended largely upon precedents viewed as compelling and mandatory which in their own premises are either dicta on the subject here, or were concerned only with exclusion, not deportation, or so confused those two issues as to give no separate analysis, and this notwithstanding that now the two issues of deportation and exclusion are marked as constitutionally, as well as logically, distinct subjects of rights. (See *e.g., Nishimura Ekiu v. United States,* 142 U. S. 651 (exclusion), cited in *Carlson v. Landon,* n. 18; *Ng Fung Ho v. White,* 259 U. S. 276 (dicta), cited in *Galvan v. Press,* p. 532; *Bugajewitz v. Adams,* 228 U. S. 585 (dicta), cited in both *Carlson* and *Galvan* at the notations above given;

stated deportation proceedings are "civil" rather than "criminal" in technical character and that in consequence certain specific constitutional sections and provisions do not there apply, as, for example, the provisions affecting bills of attainder, *ex post facto* laws and jury trials (*Harisiades v. Shaughnessy, supra; Bugajewitz v. Adams,* 228 U. S. 585; *Carlson v. Landon, supra,* at p. 537), nonetheless it is undisputedly the law that *procedural due process* as a constitutional guarantee does apply to and condition deportation proceedings, and that the hearing given persons charged with deportability must be constitutionally fair and must respect fundamental safeguards of procedure. (*Kwock Jan Fat v. White,* 253 U. S. 454, 457; *Yamataya v. Fisher,* 189 U. S. 86, 100-101; *Kwong Hai Chew v. Colding,* 344 U. S. 590, 595-598; *Wong Yang Sung v. McGrath,* 339 U. S. 33, 49; *Heikkila v. Barber,* 345 U. S. 229, 234; *Johnson v. Eisentrager,* 339 U. S. 763, 770-771; *Bridges v. Wixon,* 326 U. S. 135, 153-154; *Kessler v. Strecker,* 307 U. S. 22, 34; *Shaughnessy v. Mezei,* 345 U. S. 206, 212; *Galvan v. Press,* 347 U. S. 522, 531; *Carlson v. Landon,* 342 U. S. 524, 537; *United States ex rel. Vajtauer v. Commissioner,* 273 U. S. 103, 106; *United*

Fong Yue Ting v. United States, 149 U. S. 698, parent case of all, cited in *Carlson* and *Galvan, supra,* and in *Harisiades v. United States,* n. 11, undermined fundamentally as precedent now because based on assumed power to discriminate in deportation on basis of *race* alone, whereas government action discriminating on basis of race is now accepted as violating at the roots the limitations of the Constitution—see, *e.g., Shelley v. Kraemer,* 334 U. S. 1; *Barrows v. Jackson,* 346 U. S. 249, and *Brown v. Board of Education,* 347 U. S. 483, second opinion, 75 S. Ct. (Adv. Ops.) 753; *Bolling v. Sharpe,* 347 U. S. 497, second opinion, 75 S. Ct. (Adv. Ops.) 753.

States ex rel. Bilokumsky v. Tod, 263 U. S. 149, 156-157; *Tang Tun v. Edsell,* 223 U. S. 673, 681-682.)

Inquiry and hearing "full and fair" (*Johnson v. Eisentrager, supra,* 339 U. S. at 771; *United States ex rel. Vajtauer v. Commissioner, supra,* 273 U. S. at 106) in deportation proceedings is "required by the Constitution" (*Heikkila v. Barber, supra,* 345 U. S. at 235), as a matter of "paramount law" (*Carlson v. Landon, supra,* 342 U. S. at 537; *Fong Yue Ting v. United States,* 149 U. S. 698, 713).

> "[Without] such hearing, there would be no constitutional authority for deportation, [since] the constitutional requirement of procedural due process . . . derives from the same source as Congress' power to legislate . . ."
>
> *Wong Yang Sung v. McGrath, supra,* 339 U. S. at 49.

> "It is well established that if an alien is a lawful permanent resident of the United States . . . he is a person within the protection of the Fifth Amendment . . . [and] not even Congress may expel him without allowing him a fair opportunity to be heard."
>
> *Kwong Hai Chew v. Colding, supra,* 344 U. S. at 596-598.

2. The Central-core Requirement of Procedural Due Process Is Fairness Appropriate to the Seriousness of the Cause —Qualified Only by Necessity. Under This, by Settled Law, Presence of the Person Charged Is Mandatory by Due Process in Hearings Affecting Liberty, Person or Life Outside Deportation Law, as to Both Criminal and Non-criminal Causes.

A. THE CORE-PRINCIPLE OF DUE PROCESS IS FAIRNESS APPROPRIATE TO THE SERIOUSNESS OF THE CAUSE, QUALIFIED ONLY BY NECESSITY.

Fairness of hearing is "due process in the primary sense". (*Brinkerhoff-Faris Co. v. Hill,* 281 U. S. 673, 681.) Its content derives from "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Snyder v. Massachusetts,* 291 U. S. 97, 105.) It is foundationed on the fact that in our democratic society "respect for the dignity of all men is central" (*McNabb v. United States,* 318 U. S. 332, 343), and from the principle that ours "is government of *laws,* not of *men.*" (*Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 177, Mr. Justice Douglas, concurring.)

Of course, both the seriousness of the cause and the practicalities of necessity may affect in a reasonable measure the content of the rights secured. What is of small consequence may sensibly be given small hearing. Similarly, what is required by necessity must be accommodated to in the field of fair hearing as in all areas of law. A $5 matter does not warrant a $500 hearing; and where a fire jeopardizes life within ten minutes, ten days of notice or of trial cannot be required. But where serious issues of liberty, person or life are at stake, the requirement of fair hearing insured by due process of law re-

quires observation of all procedural rights needful to fairness, save only as conditioned by necessity. (*Mattox v. United States,* 156 U. S. 237, 243; *Cooke v. United States,* 267 U. S. 517, 636-637; *In re Oliver,* 333 U. S. 257, 274; *Anderson v. Dunn,* 6 Wheat. (19 U. S.) 204, 231; *Offutt v. United States,* 348 U. S. (Adv. Ops.) 11, 14, 75 S. Ct. (Adv. Ops.) 11, 13; *Ownbey v. Morgan,* 256 U. S. 94, 102-104; *Endicott Co. v. Encyclopedia Press,* 266 U. S. 285, 288-289.) Absent necessity, or rare exception born of practical circumstance or of history, what is required to be fair, is required by due process.

> "The high social and moral values inherent in the procedural safeguard of a fair hearing are attested by the narrowness and rarity of the instances when we have sustained executive action even though it did not observe customary standards of procedural fairness."
>
> *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 167, Frankfurter, J., concurring.

The pervasive reach and the unyielding character of due process securities of fair procedure reflect the circumstance, pregnant with significance, "that most of the provisions of the Bill of Rights are procedural" (*Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 179, Douglas, J., concurring), and the stated conviction of this Court that "[the] history of liberty has largely been the history of observance of procedural safeguards" (*McNabb v. United States,* 318 U. S. 332, 347).

B. Presence of the Person Charged Is Mandatory by Due Process in Hearings in Criminal Causes.

The right of presence at one's trial is "one of the fundamental guarantees of life and liberty" (*Kirby v. United States,* 174 U. S. 47, 55), and it is regarded in criminal matters "as being scarcely less important to the accused than the right of trial itself" (*Diaz v. United States,* 223 U. S. 442, 455). It is a "leading principle [which] pervades the entire law of criminal procedure . . . that, after indictment found, nothing shall be done in the absence of the prisoner" (*Lewis v. United States,* 146 U. S. 370, 372).

The purpose and significance of the right of presence is several-sided. Actually it is a right which is a precondition of, and hence includes either partially or wholly, several independent and separable rights, including most importantly the rights of confrontation, observation and cross-examination, and the right to assist, and be assisted by, counsel. (V Wigmore on Evidence, Ch. XLVII; *Dowdell v. United States,* 221 U. S. 325, 330.) The basis for its guarantee is its plain necessity to fair hearing; it is indispensable as a safeguard against either witting wrong or unwitting error.

> "The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind, [and necessary to this is accurate judgment and fair trial, to which it is utterly indispensable that the accused] be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceeding against him. If he be deprived of his life or liberty without being so

present, such deprivation would be without that due process of law required by the Constitution."

Hopt v. Utah, 110 U. S. 574, 579.

Whether established so in an individual case or not, "personal presence of the accused from the beginning to the end of a trial . . . must be assumed to be . . . vital to . . . defense, and cannot be dispensed with." (*Schwab v. Berggren,* 143 U. S. 442, 448.) A right to trial at all "implies that [the accused] shall have a right to be present." (*Schwab v. Berggren,* 143 U. S. 442, 450.)

A provision securing the right of presence "is found in the constitutions of [all] the several States, and . . . is embodied in the Sixth Amendment to the Constitution of the United States." (*Diaz v. United States,* 223 U. S. 442, 454-455.) And, apart from such specific provisions, as to all portions of hearings having basic import, "the presence of a defendant is a condition of due process" under the Federal Constitution, because deemed to such extent indispensable to "a fair and just hearing." (*Snyder v. Massachusetts,* 291 U. S. 97, 107-108.)

> "Our traditions, the Bills of Rights of our federal and state constitutions, state legislation and the decisions of the courts of the nation and the states, unite in testimony that the privilege of the accused to be present throughout his trial is of the very essence of due process. * * * In the light of the universal acceptance of this fundamental rule of fairness . . . it is not a matter of assumption but a certainty that the Fourteenth Amendment guarantees the observance of the rule."
>
> *Snyder v. Massachusetts,* 291 U. S. 97, 128-131, Roberts, J., dissenting on other grounds not here material.

The use of depositions without confrontation cannot be squared in criminal hearings with the mandatory requirement of presence of the accused. Hence in such proceedings such procedure is constitutionally disallowed.

> "This provision [right of presence] . . . intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witness as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of . . . cross-examination."
>
> *Dowdell v. United States,* 221 U. S. 325, 330.

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . ."
>
> *Mattox v. United States,* 156 U. S. 237, 242.

C. Presence of the Person Charged Is Mandatory by Due Process in Non-criminal Proceedings Outside Deportation Law Affecting Liberty, Person or Life.

Though like deportation proceedings not deemed to be protected by strictly criminal constitutional provisions, non-criminal hearings affecting liberty, person or life outside deportation law requires presence of the person charged as a condition of due process as fully as do proceedings criminal in nature, and by settled law. Notable are confinement proceedings based upon psychopathy

charges or upon claims of insanity, and proceedings held to authorize asexualization operations or other acts jeopardizing life or person.

Insanity and psychopathy confinement proceedings are not purposed at punishment but rather at treatment and rehabilitation. Notwithstanding this, it is firmly established law that in such proceedings presence of the person charged is jurisdictional to a fair and constitutional hearing, save only where reasonably feared as dangerous to the accused or to others. (*Simon v. Craft,* 182 U. S. 427; *Chaloner v. Sherman,* 242 U. S. 455; *Pearson v. Probate Court,* 309 U. S. 270, 275-7; *In re Lambert,* 134 Cal. 626, 633; 28 Am. Jur. 665-6; 12 Am. Jur. 286-7; 16 C. J. S. 1194-5; Comment, "Habeas Corpus and Commitment of the Mentally Ill," 10 Ohio St. L. J. 376-382.) Such proceedings are so serious in nature they require "every proper safeguard." (*In re Moynihan* (Mo.), 625 S. W. 2d 410, 416.) So basic is the right of presence in such proceedings that it will be presumed any exercise of custody is purposed at insuring, not preventing, attendance, since it is "the absolute duty" of all officers of law to insure attendance of persons affected at such hearings "if . . . fit to attend . . ." (*Simon v. Craft, supra,* 182 U. S. at 436.) This Court, in *Pearson v. Probate Court,* stated: "We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity . . . and the special importance of maintaining the basic interests of liberty" in such cases (309 U. S. 270, 276-7).

Like scrupulous regard for due process, including mandatory requirement of the presence of the person affected, obtains in proceedings directed at authorizing asexualization operations or other medical actions jeopardizing life

or person, although such proceedings are also purposed at ends other than criminal punishment. (*Buck v. Bell,* 274 U. S. 200, 206; *Williams v. Smith,* 190 Ind. 526, 131 N. E. 2; *Brewer v. Valk,* 204 N. C. 186, 167 S. E. 638, 87 A. L. R. 237; Annotation, "Asexualization or Sterilization of Criminals or Defectives," 40 A. L. R. 535, supplemented in 51 A. L. R. 862 and 87 A. L. R. 242.)

The short of it is that it could not be conceived of under due process of law that a person proceeded against under insanity, psychopathy or asexualization proceedings, or other proceedings of like nature affecting liberty, person or life, could be heard without presence, notwithstanding the circumstances that the object of government is not criminal punishment.

3. On Like Scores Fair Hearing Makes Presence of the Person Charged Similarly Mandatory in Deportation Proceedings, and Denial of Such Mandatory Right Violates Due Process. Particularly Is This so in the Premises at Bar Where the Violation of the Right of Presence (1) Was Total, (2) Was Needless, (3) Concerned a Hearing Wherein Most Grievious Forfeitures Were Factually at Stake Should Deportation Be Ordered, and (4) Was Otherwise Aggravated in Consequence.

A. THE VIOLATION OF THE RIGHT OF PRESENCE AT BAR WAS TOTAL—THE TRIAL WAS TOTALLY TRIAL IN ABSENTIA.

Trial without presence is not even the appearance of fair trial.

As set forth in the Statement of the Case, *supra,* the instant case involves not merely the use of an incidental deposition but the presentation by deposition, taken without the presence or agreement of petitioner or his counsel, of *the entirety of the substantive evidence of deportability.*

This is *total trial in absentia*. The vice of foreign depositions assumes at bar, therefore, in substance, the qualitative degree of *total* impropriety of method of trial, not merely partial violation of form or right. Unless condemnation in deportation may be had without any requirement of presence at all, the proceedings below must fail.

Fairness of hearing in all serious causes is the concern of all society, for violation of rights or unfairness of judgment as to one person undermines security for all others. "The public has an interest in [every accused's] life and liberty" (*Lewis v. United States*, 146 U. S. 370, 374), and the requirement of due process is "that justice must not only be done but must manifestly be seen to be done." (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 172, n. 19, Frankfurter, J., concurring, quoting the English decision, *Rex v. Bodmin Justices* (1947), 1 K. B. 321, 325). *Total trial in absentia* in a proceeding affecting liberty and most grievous forfeitures, as at bar, cannot be thought to be "justice . . . seen to be done."

B. The Violation of the Right of Presence Below Was Needless and Was Had Only to Suit Government Convenience and Economy.

Particularly to be noted at bar is the consideration and circumstance that denial of the safeguard of presence of the accused below was undertaken out of no reason of necessity but solely for government convenience and accommodation. The witnesses whose depositions were taken all resided in Hawaii and were within federal jurisdiction and fully answerable to compulsory federal process, and could have been produced by the government at the hearing had the government undertaken so to do. They were not produced simply because appearance in

Hawaii by deposition suited government convenience and economy only. Thus the instant case carries a fearsome precedent—trial without presence in deportation where such suits administrative pleasure and choice.

It was conceded below by the government [S.R. 242-246] that deportation witnesses within the United States (and Hawaii is no different) are on occasion moved by the government from one place to another to permit production at place of hearing for purposes of confrontation and cross-examination, the example given being the production at various political deportation hearings of the witness Paul Crouch. The government seeks here a ruling that such production is at pleasure and not of right. If such precedent be established the spectacle is presented of possible wholesale deportation trials in *absentia* with accusations made by informer witnesses in New York or Washington, D. C., on wholesale scale, while the hapless alien victims are miles removed in California or other distant points, and where the breaking of life and family is had totally *ex parte* and without check or restraint whatever by confrontation or cross-examination.

Under the law, where the right of presence obtains at all disregard of it may be justified only by necessity. Subsumed within presence are the included rights to confront witnesses, to cross-examine, to observe the conduct of one's trial, and the right to assist, and be assisted by, counsel. Disregard of such fundamentals of fair hearings can only be justified by compelling necessity.

Where a witness cannot be produced at the place and forum of hearing because dead, ill, insane, or beyond the physical jurisdiction of the hearing tribunal, if the testimony is available in a form taken under oath, as by deposition or at a preliminary proceeding or prior trial, or if

uttered as a dying declaration, due process, out of *necessity* only, accepts the testimony without appearance. But this is by force of irremediable circumstances only, not in any measure to accommodate to pleasure or convenience merely. (*Kirby v. United States,* 174 U. S. 47, 61; *Motes v. United States,* 178 U. S. 458; *Mattox v. United States,* 156 U. S. 237, 242-3; *Dowdell v. United States,* 221 U. S. 325, 329 *et seq.; West v. Louisiana,* 194 U. S. 258; *Reynolds v. United States,* 98 U. S. 145; *Diaz v. United States,* 223 U. S. 442.)

To tolerate violations of any of the basic safeguards of fair hearing in trials affecting liberty, person or life *needlessly* and to accommodate convenience and government economy only, misconceives fundamentally the function of due process of procedure in society. Disposing of liberty and like personal rights is a most serious matter—to all men, in and outside the particular cause. Such matters are not to be equated to or balanced against government convenience, economy or pleasure. With respect to them the requirement of government is to *insure,* not merely *tolerate,* fairness, and convenience and economy have no fair weight because opposed by values priceless by very definition. Hence needless violations of rights important to fairness in trials affecting liberty, person or life deny fundamentally the dignity and value of men and thereby offend "law of the land."

C. THE CONSEQUENCES AT STAKE IN DEPORTATION PROCEEDINGS CAN BE AND AT BAR WERE AS SERIOUS AND PENALIZING AS THOSE IN CRIMINAL PROCEEDINGS PROPER.

Where as at bar deportation affects an alien with "roots . . . deeply fixed in this land" (*Bridges v. Wixon,* 326 U. S. 135, 154), who has become a "part of the American community" (*Galvan v. Press,* 347 U. S. 522, 530), deportation is in its consequences "the equivalent of banishment or exile." (*Fong Haw Tan v. Phelan,* 333 U. S. 6, 10; *Jordan v. De George,* 341 U. S. 223, 231.) It may result in loss "of all that makes life worth living." (*Ng Fung Ho v. White,* 259 U. S. 276, 284.) In such settings it cannot be gainsaid that for the alien "the stakes [are] indeed high and momentous." (*Delgadillo v. Carmichael,* 332 U. S. 388, 391.) Indeed, "in the present upheavals in lands to which aliens may be returned [jeopardy may exist even] to life itself." (*Wong Yan Sung v. McGrath,* 339 U. S. 33, 50.)

Because of this, at least in cases factually involving the features of grievous forfeiture and exile, "meticulous care" must be exercised to guarantee hearings meeting "the essential standards of fairness." (*Bridges v. Wixon,* 326 U. S. 135, 154.)

Hence it is that this Court on numerous scores has applied in deportation proceedings principles protective of individual rights and fair hearing deriving in origin from criminal law causes, including the void for vagueness test as to the validity of statutes (*Jordan v. De George,* 341 U. S. 223, 231), the principle of narrow construction of

laws (*Delgadillo v. Carmichael,* 332 U. S. 388; *Fong Haw Tan v. Phelan,* 333 U. S. 6, 10), and a presumption of defense approaching closely the criminal law presumption of innocence (*Kwock Jan Fat v. White,* 253 U. S. 454, 464; *Baumgartner v. United States,* 322 U. S. 665; *Schneiderman v. United States,* 320 U. S. 118).

The deportation forfeitures factually involved at bar, as set forth in the Statement of the Case, *supra,* are of such quality and number as to equal, and indeed in features surpass, the consequences in criminal proceedings of even the most serious nature. At bar there is posed deportation of an individually lawfully admitted to the United States, who has lived all the meaningful years of his life, all years since merest childhood, in this country, and who is tied to this land by marriage, by fatherhood, by language, and by custom, culture and fullest assimilation, and to whom all other lands are alien and unknown. More, there obtains at bar jeopardy even to life. Such jeopardy attends particularly, if not exclusively, political deportations, and such is the deportation at bar. Moreover, the order of expulsion below is directed to South Korea, a land wherein, as evidenced by circumstances judicially noticeable by this Court and widely commented upon by informed and able observers, there has been secured in the recent past small guarantee even for life or person where political dissent has been manifested or upturned*

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*At bar an application was made and granted for an administrative order staying temporarily deportation to South Korea (though not elsewhere) because of jeopardy of physical persecution, and such stay is presently in effect. However, stay orders of this character are discretionary, and temporary only, under the statutes, and do not eliminate jeopardy since they are subject to recall with no certainty of right.

In fine, the premises at bar exemplify deportation in its most jeopardous and hurt-inflicting form. In such a proceeding due process, if it is to be meaningful at all, must secure fairness of hearing measured by at least the *minimals* of fairness required in criminal and non-criminal proceedings outside deportation affecting liberty, person or life, including in particular the foundational safeguard of mandatory presence of the person charged.

Petitioner at bar forfeits family, liberty and homeland, and faces literal "banishment and exile," if deportation be had, and it cannot accord with reason to suggest that such can be imposed upon him with less regard for fair hearing because only inflicted in deportation proceedings. It denies all substance in law to say the Constitution in securing fair hearing regards less a man's life, because only government chooses the form and forum of deportation rather than of criminal charge under which to move.

Forcible, total and permanent separation from wife and children, loved and loving as at bar, is a forfeiture which in itself is exceeded by few criminal penalties, if any, in severity. Deportation threatens such. Again, consider the consequences of exile as a forfeiture. Banishment from one's homeland to roam the world at large—such would be unconstitutional as "cruel and unusual punishment" if imposed as a criminal forfeiture, no matter by how fair a hearing guilt might be found. It accords little with fair policy to suggest such punishment, so grievous in nature as to "fit" no possible crime, can yet be validly inflicted without even fairness in hearing because only government acts in the name and form of deportation proceedings. Even though not techn'cally criminal in character, deportation proceedings require in reason, where

they equal or surpass the seriousness of criminal causes, equality in security of fairness of hearing.

It is error therefore to say, as did the Court of Appeals below, that because deportation is "civil" the accused person "need not be confronted by the witnesses [and] evidence may be taken by depositions," and "financial inability of an alien to insure attendance of himself or his attorney . . . is not a denial of due process." Where civil matters amount merely to private contests over property rights, there is fairness in saying that rights not asserted even at premium of distant action, likely represent merely reasonable compromises had after balance of costs against stakes, and that what is ill defended is likely also small of value. It is otherwise where "civil" proceedings affect forfeiture of liberty, person or life, and where the proceedings are government-instituted and involuntary. There a fair hearing must be *provided,* not merely not be prohibited, and there foreign depositions without confrontation cannot be had for considerations of convenience alone, without violating fundamental constitutional requirements of fair play. Human injury, whether purposed by society or not, requires hearing commensurate with its nature. Before heavy blows, there must be fairest hearing —and this without regard for fine distinctions as to purpose.

Society cannot afford to be careless with liberty, person or death.

D. The Character of the Examination and Witnesses in the Depositions at Bar Particularly Required Confrontation and Cross-Examination.

As set forth in the Statement of the Case, *supra*, the depositions at bar were not only taken *ex parte*, but were characterized additionally by particularly objectionable features of examination, and by other weaknesses.

The witnesses were interrogated by extreme leading examination and were invited to testify in terms purely of conclusions and of opinions expressed without foundation or even clarity and freedom from ambiguity; they were even encouraged to guess. Indeed, they were asked in their interrogation to state whether as witnesses they had "no reason to doubt" the charges against petitioner [S.R. 320].

Additionally, the witnesses were accomplices, and informers, and their testimony as such was therefore particularly requiring of confrontation and cross-examination. Furthermore, "identification" of petitioner in all instances was by "passport photo" only, hardly a basis to be welcomed as foundation for destroying life, family and liberty.

The character of the depositions at bar, therefore, particularly required observation at bar of the requirements of presence, confrontation and cross-examination.

E. The Depositions at Bar Were Within the Area of the First Amendment.

A final circumstance aggravating the vice of denying below a hearing safeguarded by presence of the accused and counsel is the fact that the charge and testimony in the case at bar fell definitionally within the area of asso-

ciation, assembly, speech and opinion, protected in the first instance by the First Amendment.

The Constitution requires particularly jealous and exacting inquiry where limitations of right affect the area of the First Amendment, whether the issue of limitation arises as one primarily of fact (*Pennekamp v. Florida,* 328 U. S. 331, 335; *Cantwell v. Connecticut,* 310 U. S. 296; *Craig v. Harney,* 331 U. S. 367, 373; *Fiske v. Kansas,* 274 U. S. 380, 385), or of law, policy and interpretation (*Winters v. New York,* 333 U. S. 507; *United States v. Carolene Products Co.,* 304 U. S. 144, 152, n. 4; *Thornhill v. Alabama,* 310 U. S. 88, 95; *Schneider v. State of New Jersey,* 308 U. S. 147, 161; *Bridges v. California,* 314 U. S. 252, 262-3).

Grave danger even to citizen speech and association lies in permitting in deportation hearings penalties on speech safeguarded so little by rules of fair hearing as to reduce guilt to matters only of merest association, or of conjecture, surmise or malice expressed only by witnesses examined without the safeguard of the presence of either the accused or his counsel.

Conclusion.

Wherefore, the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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